STATE OF MICHIGAN
SUPREME COURT

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, AND JAMES B. LINDEBAUM,

PLAINTIFFS-APPELLEES,

Supreme Court #130574

Court of Appeals No: 258021

Bay Circuit Court File No: 01-3467-CZ-C

VS.

JOYCE SCHMITT AND DIANE RANKIN,

DEFENDANTS-APPELLANTS.

AND

RONALD SCHMITT,

DEFENDANT.

PLAINTIFFS-APPELLEES ANSWER TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

130574

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Plaintiffs JoAnn Kusmierz, Kerry Kusmierz, Kim Lindebaum and James Lindebaum have also sought leave to appeal from the November 15, 2005 published opinion of the Court of Appeals (Court of Appeals Docket No. 258021) in Supreme Court Case No. 130187. That opinion reversed and remanded the trial court's decision to award case evaluation sanctions to the Plaintiffs in a post-judgment order following trial. (Exhibit A)

Plaintiffs and Defendants agree that the methodology utilized by the Court of Appeals was unfair, contrary to the court rules, and unsupported by legal authority. Plaintiffs, unlike the Defendants, are seeking reversal of the Court of Appeals' interpretation of the case evaluation rules and an order affirming the decision of the trial court. Specifically, Plaintiffs seek a finding from this court that:

1. The Michigan Court Rules Regarding Case Evaluation Sanctions **do not require** the court to compare the case evaluator award and the jury verdict **using percentages** between **each pair of plaintiffs and defendants under MCR 2.403(O)(4)(a).**
2. The Michigan Court Rules do permit a trial court to consider equitable relief under MCR 2.403(O)(5) even where the case evaluators do not take equitable relief into consideration.
3. Reasonable Attorney fees under MCR 2.403(O)(6) are awardable to the prevailing party even when attorney fees have previously been awarded pursuant to an unrelated statute.

Additionally, Plaintiffs seek reversal of the Court of Appeals determination that Defendants did not waive their right to appeal when they paid Plaintiffs the judgment and case evaluation sanctions in full and requested Plaintiff to sign a Satisfaction of Judgment. This is set forth in Plaintiff's application.

Standard of Review

The trial court's decision whether to award mediation sanctions is reviewed for an abuse of discretion. *See Great Lakes Gas Transmission v Markel,* 226 Mich App 127; 573 NW2d 61 (1997). *See also J. Gordon Gaines, Inc. v 221*, Inc, 2000 WL 33421256 (*Unpublished Michigan Court of Appeals*) (indicating that the trial court had discretion in determining whether to award sanctions because the verdict included an award of equitable relief.) *See also Brandon v Klinske,* 1998 WL 1997691 (*Unpublished Michigan Court of Appeals*) citing *Great Lakes Gas Transmission v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997) (The trial court's decision whether to award mediation sanctions under MCR 2.403(O)(5) is reviewed for an abuse of discretion.) *See also Price Co. v D & T Const. Co., Inc.*, 1997 WL 33343944 (*Unpublished Michigan Court of Appeals*).[1]

Defendants' standard of review is erroneous upon this cited authority.

Plaintiffs do not disagree that issues involving interpretation of a court rule present a question of law that are reviewed de novo. *Marketos v. American Employers Ins Co,* 465 Mich. 407, 412; 633 NW2d 371 (2001).

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[1] MCR 2.403(O)(5) is not the only exception to de novo review. The appellate court reviews the trial court's decision for an abuse of discretion where the interest of justice standard is applied pursuant to MCR 2.405(O)(11). *See Harbour v Correctional Medical Services, Inc.*, 2005 WL 1224779, ___NW2d___ (2005).

Restatement of Questions Presented

I. **DID THE TRIAL COURT PROPERLY AWARD ATTORNEY FEES PURSUANT TO MCR 2.403, CASE EVALUATION SANCTIONS, WHERE LESS THAN THE ACTUAL ATTORNEY FEES WERE AWARDED BY THE JURY PURSUANT TO MCLA 600.2911 AS DAMAGES?**

Plaintiffs-Appellees says: "YES"

Court of Appeals says: "YES"

Trial Court says: "YES"

II. **DID THE COURT OF APPEALS ERR IN FINDING THAT PLAINTIFFS JAMES AND KIM LINDEBAUM WERE ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS IN THE CASE, WHERE THE ADJUSTED VERDICT WAS LESS THAN THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)?**

Plaintiffs-Appellees says: "NO"

III. **WAS IT PERMISSIBLE FOR THE TRIAL COURT TO CONSIDER THE AWARD OF INJUNCTIVE RELIEF AS A BASIS FOR AN AWARD OF CASE EVALUATION SANCTIONS IN THIS CASE?**

Plaintiff-Appellees says: "YES"

Court of Appeals says: "YES, but found it unfair under the circumstances."

Trial Court says: "YES"

IV. **DID THE TRIAL COURT ERR IN DENYING ATTORNEY FEES TO DEFENDANT JOYCE SCHMIT WHERE PLAINTIFFS WERE AWARDED MONETARY AND EQUITABLE RELIEF AT TRIAL?**

Plaintiffs-Appellees says: "NO"

Trial Court says: "NO"

Court of Appeals says: "NO"

Statement of Material Proceedings and Facts

This Application for Leave to Appeal is based solely on the interpretation of the case evaluation rule MCR 2.403 and the methodology for determining the prevailing parties and assessing sanctions.

Subsequent to the trial in this matter, the trial court awarded case evaluation sanctions in the amount of $67,259.60 pursuant to MCR 2.403. The trial court compared the case evaluation award to the verdict and also took into consideration equitable relief in the form of an injunction entered against the Defendants post-trial.

Plaintiffs collected the full judgment and case evaluation sanction award. Defendants requested that a satisfaction of judgment form be executed by the Plaintiffs.[2] Subsequently, Defendants filed an appeal challenging the award of case evaluation sanctions by the trial court. Plaintiff requested that the decision of the trial court be affirmed.

1. Court of Appeals

The crux of this application centers on the implementation by the Court of Appeals of a new methodology for apportionment of lump-sum case evaluation awards which is inconsistent with the language of the court rules, unsupported by prior authority, voids the stipulation of the parties that the plaintiffs are treated as a single party, and fundamentally unfair to the parties who were operating under the language of the court rules.

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[2] Plaintiffs maintain and argue in their Application that the appeal rights of the Defendants were waived by requesting the satisfaction of judgment.

On its own motion, the Court of Appeals determined that Plaintiffs could not elect to be treated as a single party under MCR 2.403(H)(4) despite the parties' stipulation and despite FN1 of the opinion (Exhibit A), indicating that **no one contests the approach**. The Court of Appeals then states, **"Accordingly, we accept this approach for purposes of our analysis..."** (Exibit A).

Contrary to this statement, the Court of Appeals then determined that each Plaintiff must be compared to each Defendant. The Court of Appeals then enacted a methodology comparing the case evaluation awards and adjusted verdicts as to each particular pair of parties. This methodology ignores the agreement to treat Plaintiffs as a single party and fails to take into consideration the harm to individual parties as done by the evaluators. The Court of Appeals formulation is in excess of two pages. This is attached as Exhibit A.

In this case, it was obvious to the trial court, the jury, and the case evaluators that the Lindebaums were harmed by the Defendants' conduct substantially more than the Kusmierzs. This was never disputed. These parties were not equal when it came to damages.

The Court of Appeals agreed that MCR 2.403(0)(5) **does not prohibit** the trial court from placing a value on equitable relief and using it to compare the verdict and case evaluation.

Plaintiffs maintain that this situation is the very reason for the rule. Had the Plaintiffs accepted the case evaluation award, they would not have received the sought after injunction. From the beginning, Plaintiffs sought to have the conduct of the Defendants stopped.

The Court of Appeals erroneously concluded, however, that the trial court erred in taking into consideration its award of injunctive relief pursuant to MCR 2.403 (O)(5) because **it was not fair under all of the circumstances reasoning** that (1) the case evaluators had not considered equitable relief, and (2) the jury had already awarded a portion of attorney fees under MCLA 600.2911(7).

Case evaluators are not permitted to award equitable relief and are not required to state whether equitable relief was taken into consideration. Under the argument of the Court of Appeals, sanctions are not permissible in any case where equitable relief is granted because we would not know the thoughts or considerations of the evaluators. The Court of Appeals further erred in categorizing attorney fees awarded pursuant to MCLA 600.2911(7) with case evaluation sanctions. Fees pursuant to 600.2911 are part of the judgment where fees under 2.403 are sanctions.

In this instance, even if the verdict consisted only of the injunction, it still would have been permissible under MCR 2.403(O)(5) to award sanctions and in this instance it would have been fair under all of the circumstances. The defamation of the Plaintiffs by the Defendants consisted of a series of continued actions that the Defendants continued to pursue and the only remedy was an injunction.

2. Basis for Action

Some factual background is necessary in order to understand the trial court's award of case evaluation sanctions.

Defendants accused the Lindebaums of being "embezzlers," "swindlers," "sexually frigid," "greedy," "selfish," "materialistic," "thieves," "a disgrace," "hypocrites," "a little bitch,"

"you've got a bad name," "mentally ill," lazy, unchaste, lacking in "morals, values and ethics," "calculating, " "Satan's Devils," "Mr. and Mrs. Embezzler," "Little Miss Saigon," "assholes," committing "Trust Fraud," "Slime-Ball Brother," "Saigon Bitch," physically abusing the aged mother, Elizabeth, "a loser," "stabbing people in the back," "pathological liar," "wimp," "Black Ballers," "guilty as sin," and other outrageous statements and untruths. (PX 1-7, 10, 21-23, 31-32)

Defendants accused the Kusmierzs of being "co-embezzlers," "swindlers," "back-stabbers," "ass kissers," "hotsy-totsy wanna-be JoAnn," of fraudulently obtaining benefits for their children by misrepresenting their financial ability, "hypocrites," making "victims" of Kerry's mother, Dad, Ma and Kerry's grandmother..." and making other outrageous statements and untruths. (PX 1-7, 10, 21-23, 31-32)

On November 7, 2000, attorney for Plaintiffs sent a letter to Defendant Joyce Schmitt and those acting in concert with Joyce, requesting that they cease from making such defamatory remarks and that they retract statements and publications regarding James, Kim, and/or the M Supply Company.[3] (PX 13) The harassment, defamation, invasion of privacy, and stalking continued. A letter from Defendant Diane Rankin was sent to "Mr. and Mrs. Embezzler," the envelope addressed to Mr. and Mrs. Jim Lindebaum, stating: "Make NO MISTAKE Jim and 'Little Miss Saigon' WE ARE WATCHING YOUR EVERY MOVE!!!!" (PX 2) It further states: "YES, I DID TALK TO ARBERTA---I TOLD HER THE TRUTH ABOUT EACH ONE OF YOU!!!"

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[3] M Supply Company is owned by James Lindebaum and was originally a party to the lawsuit.

In a subsequent letter from Diane to "Slime-Ball Brother and Saigon Princess" (the Lindenbaums), she states in the middle of her outrage:

> BY THE WAY JIM, HAVE YOU HEARD HOW UPSET ALL OF MA AND DAD'S NEIGHBOR'S ARE WITH YOU FOR WHO THE PROPERTY WAS SOLD TO??? YOUR BAD REPUTATION IS GROWING!!!!! IF YOU THINK FOR ONE MINUTE, ME OR THE OTHER FAMILIES INVOLVED ARE GOING TO SHUT OUR MOUTH, YOU HAVE ANOTHER GUESS COMING....FOR AS LONG AS WE LIVE, WE WILL MAKE SURE PEOPLE KNOW WHO YOU ARE, WHAT YOU ARE, ... (PX 4)

Threats of government intervention and jail time were included as well as allegations that Jim hurried the death of his parents along. (PX 2) Joyce stated in her phone messages that she contacted the authorities. (PX 30 and 31) Subsequently, Kim and Jim were audited. (Vol IV, Pg 188)

The same types of letters were sent to the Kusmierzs. An anonymous person, referencing herself as "Jean," sent a letter to the Kusmierzs and numerous other individuals discussing how the Kusmierzs were defrauding the system and taking money that should go to disadvantaged children. (PX 15) Diane sent another letter to the Kusmierzs describing them as "Co-Embezzlers" and "Back Stabbers." Diane states in one of her letters that she received the letter from "Jean" and telling JoAnn how she is lower than her and how she is just "Miss Hotsy Totsy." Diane tells her that "Paybacks Are Hell." (PX 3)

Plaintiffs received other letters from individuals they do not know. Plaintiffs received subscriptions to magazines, such as Playboy, which they had not ordered. (PX 23) Defendants drove by Plaintiffs James and Kim Lindebaum's residence to spy on them

whenever they felt like it as a further form of harassment. (Vol VI, Pg 132-133; Vol I, Pg 188; Vol II, Pg 48-49; Vol VI, Pg 186)

The Lindebaums were forced to obtain additional security devices for their premises. (Vol II, Pg 113-114; Vol IV, Pg 185) The only mechanism for ceasing this type of behavior was a lawsuit. The complaint included counts of Defamation, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Intentional Interference with Advantageous Business Relationship.[4] Only after three years of litigation and thousands of dollars in costs to the Plaintiffs did the behaviors set forth above cease. Only at the time of trial was there an expression of remorse on the part of the Defendants. (Vol II, Pg 34-35; Vol III, Pg 150)

The trial court and the jury determined that Defendants Diane and Joyce are liable to the Plaintiffs for their tortuous conduct. Yet despite the remorse, they continued to allege conversion and embezzlement.

The trial court determined that in addition to a monetary judgment, equitable remedy in the form of an injunction was warranted. Based on the money judgment and the injunction, the Court held that case evaluation sanctions were awardable to the Plaintiffs in the amount of $67,259.60. (Exhibit B)

Defendants satisfied the judgment on September 7, 2004 and subsequently filed an appeal to have the order for sanctions reversed. (Exhibit C) Plaintiffs maintain that Defendants waived the right to appeal the order when they opted to satisfy the judgment rather than obtain a bond. This is set forth in Plaintiffs' application.

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[4] The count for Tortuous Interference with Advantageous Business Relationship was dismissed prior to trial.

3. The Underlying Facts Necessitating a Complaint

Plaintiff's JoAnn Kusmierz and James Lindebaum ("Jim") are brother and sister, and Plaintiffs Kerry Kusmierz and Kim Lindebaum are their respective spouses. Defendants Joyce Schmitt and Diane Rankin are sisters of Plaintiffs JoAnn and James Lindebaum. Defendant Ronald ("Tobe") Schmitt is the husband of Joyce Schmitt.

The Lindebaum family was headed by Joseph and Elizabeth Lindebaum who raised their nine children, eight girls and one boy, in Bay City, Michigan. Joseph Lindebaum owned and operated M-Supply Company which originally operated out of Bay City, Michigan and was later relocated to West Branch. Joseph Lindebaum eventually sold the business and a nearby farm to his son, Plaintiff James Lindebaum.

It was evident from the testimony at trial that this dispute was based on more than simple sibling rivalry and jealousy between the nine Lindebaum children. The jealously and hostility between certain siblings escalated during the illness and eventual death of the father, Joseph Lindebaum, and **rose to the point of threats and harassment**, far past a simple "bitter family dispute" as characterized by Defendants, following the death of the mother Elizabeth Lindebaum. Defendants spread their hate through the small community of West Branch.

Both Joseph and Elizabeth planned for the distribution of their estate through the execution of a pour-over will and a revocable trust.[5] (Vol I, Pg 116-117; PX9, DX11, DX12)

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[5] Joseph and Elizabeth amended their wills and trusts several times prior to their death. (Vol I, Pg 135) At the time of Elizabeth's death, the 12th Amended Trust was in effect, and at the time of Joseph's death, the 8th Amended Trust was in effect.

The nine children were **excluded from the will**. As a result of Joseph passing on first, Elizabeth received the property; her trust and pour-over will distributed the estate at the time of her death. (PX9; DX11; DX12; Vol I, Pg 89-90) Elizabeth's trust requested that **everything in her estate go to charities.** (PX12; Vol V, Pg 54)

Joyce and Diane argued that there were life insurance policies and gold in the estate that they were entitled to receive, as well as several personal items. (Vol I, Pg 142-143) Both Joyce and Diane admitted at trial that they had no evidence which would establish that their brother James Lindebaum had knowledge of a $300,000.00 life insurance policy, gold bars, or the identified personal items claimed.[6] (Vol I, Pg 125, 142, 167-168, 173, 180) James Lindebaum was not the trustee for Elizabeth Lindebaum's estate, that responsibility was held with the Bank of Alma. (PX9; Vol I, Pg 118) In addition, the Bank of Alma worked with Greg Demers, Joseph and Elizabeth's estate attorney, regarding the distribution of the estate. (Vol V, Pg 46)

Subsequent to the death of Joseph Lindebaum on February 13, 1998, Elizabeth sold the marital residence and distributed the proceeds to various children, grandchildren, and

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[6] Despite being concerned about the distribution of property, Diane Rankin never contacted the Bank of Alma. (Vol I, Pg 119, 146) Greg Demers in a letter to all the children specifically explained that the Bank of Alma was the trustee and personal representative. (PX8) The will, PX9, which specifically excludes the children, was enclosed with the Greg Demers letter. In addition, Greg Demers provided an explanation of the distribution. (Vol V, Pg 43-44)

charities.[7] (Vol I, Pg 139; Vol IV, Pg 126-128) In addition to the decision by their mother Elizabeth to distribute her estate while she was still living, Joseph and Elizabeth experienced a tragic event on July 12, 1996 – their home in Bay City burned down unexpectedly. Several personal items were destroyed.

Until Elizabeth passed away on November 7, 1999, she resided with various daughters. There were several arguments during this period of time between Elizabeth, Joyce and Diane. This resulted in Elizabeth amending her will to disinherit her children. Elizabeth, in an effort to avoid inter-family disputes between the children at the time of her death, began distributing her assets.

The harassment by Joyce Schmitt and Diane Rankin towards the Plaintiffs began almost immediately after the death of Elizabeth. Angered by their mother's distribution of the assets, they made false allegations that Jim was withholding or converting their inheritance. (Vol VI, Pg 140) A few selected events are:

- Phone calls from Joyce to Jim demanding money and threats to spread the word that James was an embezzler. (Vol IV, Pg 118, 141-142; Vol VI, Pg 140-148)
- Diane drove down Esmond Road, the location of Jim's residence to "watch his every move." (PX 2; Vol II, Pg 48-49)

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[7] Diane received a $2,000.00 CD by her mother. (Vol I, Pg 118) James Lindebaum did not benefit or receive proceeds from the sale of the house. (Vol IV, Pg 127) Nor did James receive anything from his mother's trust at the Bank of Alma. (Vol IV, Pg 132)

- Tobe Schmitt went to the Plaintiffs' farm on December 23rd demanding money and threatening to disparage Jim's name in West Branch. (Vol IV, Pg 142)
- Tobe and Joyce went to the Plaintiffs' farm, making threatening statements and demanding money, gold bars, and life insurance policies. (Vol IV, Pg 147-148; Vol VI, Pg 140-148)
- Joyce, Tobe, and Diane contacted Jim and Kim's pastor, Reverand Teall, approximately 30 times by phone and in person, discussing the contents of the letters claiming that Plaintiffs were embezzlers, backstabbers, etc. (Vol II, Pg 93, 189-190; Vol III, Pg 124-125, 128, 130,133, 135-136) The pastor pled with the Defendants to stop the harassment. (Vol III, Pg 134-135)
- Joyce indicated to Pastor Teall that something terrible was going to happen to Jim. Pastor Teall feared that Joyce's threats would come true. (Vol III, Pg 142)
- Joyce left packages at Plaintiffs' place of business, M-Supply Company on Kim's desk. (Vol III, Pg 29) Joyce does not work at M-Supply nor was there a reason for her to enter M-Supply premises other than for harassment.
- Joyce left messages on the Lindebaum telephone about contacting friends and church members to let them know about Jim's embezzlement and that she was going to contact the government. Threats also included "Enjoy your freedom for two more days." (Vol VI, Pg 101; 170-171, 174)

- Threats by Joyce to involve Jim's ex-wife, ex-mother-in-law, and his daughter. (Vol IV, Pg 152)
- Several Letters were sent by the Defendants to the Plaintiffs and given to other brothers and sisters and friends, including Pastor Teall. (PX1; Vol IV, Pg 159; PX5; PX21, PX6)
- Cards from unknown persons were sent to the Lindebaums and Kusmierzs. (Vol IV, Pg 164-165; Vol VI, Pg 18-19; PX5; PX21)
- Unsolicted Playboy magazine subscriptions were sent to the Lindebaums' residence. (PX 23; Vol IV, Pg 166-167)
- Religious documents including highlighting over the commandment "thou shalt not steal" were also sent to the Lindebaums' residence (PX 24; Vol IV, Pg 176)
- Three pounds of nails were thrown in the Lindebaum's driveway. (Vol IV, Pg 178-179)
- Threats were made by the Defendants to contact governmental agencies. (Vol IV, Pg 185)
- Defendants informed several people that James, Kim, JoAnn, and Kerry were embezzlers and other untruths to third parties including Alberta, Reverend Teall, a state trooper, John Voss, the remaining siblings, and Kevin Elliot. (Vol II, Pg 60, 93, 100; Vol III, Pg 43, 50-51; Vol VI, Pg 37, 96-98)
- Allegations were made in the letters that James hurried the death of his parents along.

- Joyce approached Kim on the highway in at a fast speed in a threatening manner. (Vol VI, Pg 154)
- PX15 alone was sent to 17 families.

There is absolutely no evidence on the record that the Plaintiffs retaliated against the Defendants actions.

Prior to filing, the Plaintiffs sought the advice and direction of attorney Skinner. On November 7, 2000, Plaintiffs counsel sent a letter addressed to Defendant Joyce Schmitt demanding that

> YOU AND ANYONE ACTING WITH YOU OR IN CONCERT WITH YOU MUST IMMEDIATELY CEASE AND DESIST FROM PUBLISHING OT UTTERING THE CLAIMS OF 'EMBEZZLEMENT' AND OTHER DEFAMATORY STATEMENTS OR PUBLICATIONS. NEXT, YOU MUST IMMEDIATELY, WITHIN THE NEXT 30 DAYS COMMUNICATE TO ALL PERSONS THAT YOU ARE WITHDRAWING SUCH STATEMENTS, AND REQUEST THAT THEY DISREGARD ANYTHING YOU HAVE SAID THAT IS SLANDEROUS ABOUT YOUR BROTHER, HIS WIFE, OR THE M SUPPLY COMPANY. (PX 13)

Diane admitted at trial that she was aware of the letter from attorney Skinner requesting that the behaviors set forth above cease and desist or that she might be sued. (Vol II, Pg 35)

This letter did not deter the Defendants' conduct. The unsolicited mail and letters from unknown individuals all arrived after the November 17, 2000 letter sent by attorney Skinner. (PX 13) In addition, the letters from Diane and Joyce continued. (Vol IV, Pg 177; PX 2, 4, 3, 7, 21, 21b) The Defendants did not withdraw their statements.

As stated by James Lindebaum: "Their harassment has – has heightened so high, it was not slowing down, it was not stopping, it was escalating. The pattern completely changed; now instead of kind of being out in the open, if you'll have it that way, we were starting to get this kind of mail delivered from whoever, at whatever time.."(Vol IV, Pg 177)

The situation continued to escalate. West Branch is a small city and slanderous statements in a small community have large impacts on business dealings and reputation.

At one point, Joyce even contacted Kevin Elliot, the insurance agent for M-Supply Company. (PX 30 and 31)

The complaint in this case was filed on June 5, 2001 as a result of the pattern of harassment initiated by Defendants that simply would not stop. (Exhibit D) Even after the lawsuit was filed, the acts of the Defendants' continued. Defendant Joyce Schmitt informed Pastor Teall following the filing of the lawsuit that **Tobe was going to go ballistic**. Pastor Teall contacted Jim who raced home **to lock himself and his wife, Kim, in the house**. Ronald Schmitt had a firearm and Jim was concerned for his safety. (Vol IV, Pg 181-182)

The jury trial was conducted in this matter beginning on April 1, 2003 and ending on April 17, 2003. The trial court directed a verdict in favor of the Plaintiffs Kim and James Lindebaum and against the Defendants Joyce Schmitt, Ronald Schmitt, and Diane Rankin as to the Plaintiff's claim on defamation per se. The Court further entered a directed verdict against Diane Rankin as to Kerry and JoAnn Kusmierz for defamation per se. Joyce and Diane were also liable to Kim and Jim for Invasion of Privacy and Intentional Infliction of Emotional Distress. Diane was further liable to the Kusmierzs on both counts. The jury issued a verdict as to the remaining issues and damages on April 17, 2003. (Exhibit E and F)

The damages including economic and noneconomic are set forth in the table.[8]

	Kim Lindebaum	James Lindebaum	Kerry Kusmierz	JoAnn Kusmierz
Joyce Schmitt	$5,000.00	$4,000.00		
Ronald Schmitt	$0	$2,000.00		
Diane Rankin	$5,000.00	$4,000.00	$1,000.00	$1,000.00

4. The Injunction

Plaintiffs' complaint and amended complaint requested all damages which arose during the course of discovery. (Exhibits D and G, ¶ 37) The Court was informed at the initial pretrial hearing on September 17, 2001 that Plaintiffs may request injunctive relief at the conclusion of the trial. (Exhibit H) Answers to interrogatories further establish that damages sought included injunctive relief. (Exhibit I)

On May 5, 2003, subsequent to the jury trial, **but prior to the entry of the February 10, 2004 Judgment** (Exhibit E and K), Plaintiffs filed a motion for a permanent injunction pursuant to MCR 3.310(H). The hearing was held on June 5, 2003. The Court rendered a written opinion and order on December 19, 2003 granting Plaintiffs' request for injunctive relief indicating: "This Court recognizes the fact that injunctive relief was not specifically requested in either Complaint, but finds that it has authority to enter such an order in the interest of justice." (Exhibit J) On February 9, 2004, the trial court issued an Order for Injunctive Relief which shall remain in effect for three years. (Exhibit K)

[8] This table is not the adjusted verdict, only the jury verdict.

The trial court's decision to grant the injunctive relief pursuant to MCR 3.310(H) is not on appeal. The only relevance of the injunctive relief now is how it relates to sanctions awarded.

5. Case Evaluation Sanctions

The complaint in this matter was filed on June 5, 2001. Pursuant to the order of the trial court, the case was submitted to case evaluation on June 20, 2002 in accordance with MCR 2.403. The case evaluation panel determined that Plaintiffs had no cause against Ronald Schmitt; the jury disagreed and awarded Plaintiff James Lindebaum $2,000.00 against Ronald Schmitt. The case evaluators awarded an aggregate of $17,500.00 to the Plaintiffs against Joyce Schmitt. The jury awarded $9,000.00. The case evaluation panel determined that the Plaintiffs had a cause against Diane Rankin and awarded the Plaintiffs an aggregate of $7,500.00. The jury awarded $11,000.00. (Exhibits E and F)

Including prejudgment interest through March 1, 2003, Diane Rankin was held liable to Plaintiffs in the amount of $12,536.43, Joyce Schmitt was held liable for $10,254.59, and Ronald Schmitt was held liable for $2,280.86.[9] (Exhibit E)

Both Joyce Schmitt and Diane Rankin rejected case evaluation. The Court further awarded equitable relief in favor of the Plaintiffs and against the Defendants in the form of a

[9] The specific findings of the jury are not relevant; however, the Judgment and verdict forms are attached to provide additional details regarding the juries' specific findings.

permanent injunction entered February 9, 2004 and expiring February 9, 2007 as set forth *supra*. (Exhibit K)[10]

Pursuant to the court rules, MCR 2.403, Plaintiffs prevailed against all three Defendants taking into account the injunction.[11]

Attorney Skinner testified during the trial regarding his attorney fees. Attorney Skinner's testimony is also not part of this appeal. Defendants raise an issue regarding the Plaintiffs' request to amend the complaint to include an award for attorney fees pursuant to MCLA 600.2911(7). This issue is completely separate from the issue of case evaluation sanctions. As set forth below, attorney fees can be awarded based on more than one statute. Statutory attorney fees must be considered separately from case evaluation sanctions.

Furthermore, statutory attorney fees calculated pursuant to MCLA 600.2911 were calculated from the date of filing the complaint and were part of the judgment while case evaluation sanctions are awardable from the date of case evaluation hearing and are sanctions—not "damages" awarded by the jury.

Attorney Skinner was required to testify in order for the jury to determine attorney fees pursuant to the slander and libel statute, MCLA 600.2911. Attorney Skinner testified that his

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[10] Clearly as to Diane, Plaintiffs were entitled to case evaluation sanctions. The trial court determined that it could not divide Plaintiff's attorney fees between Defendants because the same amount of work was required regardless of the number of named Defendants. The trial court held that Defendants could seek contribution from one another in a separate suit. Diane paid the majority of the sanctions. (8-31-04 Motion at 16-17)

[11] Monetarily, Plaintiffs succeeded against Ronald Schmitt and Diane Rankin. Taking into account the monetary award by the jury and the injunction, Plaintiffs also succeeded against Joyce Schmitt.

hourly rate was $210.00 per hour. (Vol VI, Pg 68) PX 28 set forth an itemized list of attorney services rendered to the Plaintiffs between November 8, 2000 and April 7, 2003, the date of attorney Skinner's testimony. The exhibit reflects actual billings for a total of 293 hours totaling $53,942.60. (PX 28)

Following the entry of the Court's final judgment, the Plaintiffs filed their motion for assessment of case evaluation sanctions. Between the date of case evaluation, June 20, 2002, and the date of filing the motion for case evaluation sanctions, March 9, 2004, attorney fees were $82,223.60. (Exhibit N)

Plaintiffs maintained that in light of both the monetary award and the injunctive relief, Defendants Joyce Schmitt and Diane Rankin were liable for case evaluation sanctions pursuant to MCR 2.403. The motion for case evaluation sanctions was argued before the trial court and taken under advisement on May 7, 2004; the court's ruling was announced during further proceedings subsequently conducted on July 6, 2004. (Mot 7-6-04, Pg 18-21) The trial court agreed that Plaintiffs were the prevailing party, took into consideration that the jury awarded some attorney fees, and awarded $67,259.60 case evaluation sanctions. (Exhibit B)[12] In ruling that the Plaintiffs were the prevailing party, claims by Defendant Joyce Schmitt for case evaluation sanctions were rejected. (Exhibit M)[13]

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[12] The trial court reduced the $82,223.60 by the $10,000.00 in attorney fees awarded at trial pursuant to MCLA 600.2911, and further reduced the fees for duplicative services.

[13] The original order was amended to clarify the trial court's ruling that Defendant Joyce Schmitt's motion for case evaluation sanctions was denied.

Plaintiffs attached their entire attorney bill incurred in the litigation to their Motion for Case Evaluation Sanctions totaling $82,223.60 for 474.31 hours. (Exhibit N)

Defendants have not appealed the jury verdict, only the order for case evaluation sanctions.

6. Collection Efforts

Collection efforts on the judgment began immediately after the order was entered on February 10, 2004 when Plaintiffs requested the issuance of garnishments against the Defendants. **Prior to the order for case evaluation sanctions, Defendants Joyce and Ronald Schmitt paid the judgment, including interest, in full voluntarily**. (Exhibit O)[14]

Defendant Rankin refused to make any payments on the judgment against her. Defendant Rankin further made discovery difficult by failing to produce requested documents. Between February 10, 2004 and August 31, 2004, Plaintiffs discovered that Defendant Rankin was expected to receive life insurance in the amount of $130,000.00 from Primerica Life Insurance Company. On July 26, 2004, Plaintiffs obtained a garnishment from the trial court including both the amount owed by Defendant Rankin from the judgment and the expected amount of case evaluation sanctions. (Exhibit P) Defendants filed objections to

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[14] Defendants do not clearly distinguish between Joyce Schmidt and Diane Rankin when it comes to satisfaction of the Judgment. Joyce Schmidt did voluntarily pay the judgment – this is not disputed. The case evaluations obtained from Primerica were for the whole amount. Therefore, the Court would have to determine the exact amount attributable to each Defendant should the Court determine that Joyce Schmidt's right to appeal was waived while Diane Rankin's right to appeal was not.

the garnishment and Plaintiffs filed a motion for restraining order to hold the funds until the issues could be properly resolved by the court.

On August 11, 2004, the trial court entered an amended order[15] to hold funds in escrow and release remaining funds. (Exhibit Q) The order states that Plaintiffs shall submit a garnishment to obtain funds from Primerica Life Insurance Company in the amount of $92,063.52 and that said funds should remain in the IOLTA account of Skinner Professional Law Corporation. Plaintiffs' position was that the funds should be held until the trial court entered an order for case evaluation sanctions.

On August 25, 2004, Primerica sent a fax to Defendants attorney, George Holmes, indicating that it was in receipt of the Order to Hold Funds in Escrow and Release Remaining Funds and that before disbursement could be made, Primerica needed verification that Diane Rankin did not intend to appeal or further challenge the order. (Exhibit R) On or about August 27, 2004, a check was received by Skinner Professional Law Corporation in the amount of $92,063.52 from Primerica. (Exhibit S) In addition, $2,000.00 was disbursed to attorney Holmes to be placed in his escrow, and the remaining funds were paid to Defendant Rankin.

On August 31, 2004, the trial court issued the order for case evaluation sanctions against Diane Rankin and Joyce Schmitt in the amount of $67,259.60 for reasonable

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[15] The original order to hold funds indicated that Skinner Professional Law Corporation would hold the funds; however, Defendant Rankin requested that the amount in excess of the $92,063.52 due and owing from Primerica Insurance Company be forwarded to her. The parties stipulated to the amendment after agreeing that attorney Holmes would maintain an additional $2,000.00 in his escrow account for future case evaluation sanctions. The $2,000.00 was returned to Diane Rankin.

attorney fees and $532.30 for costs. (Exhibit B) Plaintiffs prepared a spreadsheet of the amount due and owing including the judgment of Diane Rankin and the entire amount of case evaluation sanctions which totaled $80,545.74.[16] (Exhibit T) The difference in the $92,063.52 and $80,545.74 was immediately returned to Defendant Rankin on September 7, 2004. (Exhibits T and U) Plaintiffs were also issued a check at this time.

Plaintiffs received a letter on September 8, 2004 from attorney Holmes indicating that the check was received, "representing the excess over the amount owing in the Judgment, with interest, costs, and Case Evaluation Sanctions." (Exhibit V) Attorney Holmes further indicated:

> With the application of the funds obtained through the Writ, the Judgment has now been paid in full. It is up to the Defendants to sort out their respective responsibilities inter se, as the Order for Case Evaluation Sanctions provided for joint and several liability.
>
> Consequently, a Satisfaction of Judgment in full is now in order.
>
> Please execute the enclosed Satisfaction of Judgment, see that it is filed, and provide copies to me and Attorney Schrope.

(Exhibit V)

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[16] The trial court determined that the defendants would have to decide how they would individually contribute to damages. (8-31-04 Motion at Pgs 16-17)

Discussion of Law

I. CASE EVALUATION SANCTIONS ARE TO BE ASSESED BY THE TRIAL COURT SEPARATELY FROM STATUTORY ATTORNEY FEES INCLUDED IN THE JUDGMENT AND CAN INCLUDE ATTORNEY FEES PROVIDED THAT THE TOTAL RECOVERY FOR ATTORNEY FEES DOES NOT EXCEED 100% OF FEES ACTUALLY INCURRED.

McAuley v General Motors Corp., 457 Mich 513, 578 NW2d 282 (1998) specifically addressed this issue. The Michigan Supreme Court held that where statutory attorney fees were awarded, MCR 2.403 could be utilized to obtain 100% of the attorney fees incurred.

In *McAuley*, Plaintiff filed suit against GMC and MESC under the Handicapper's Civil Rights Act. The mediators awarded Plaintiff $12,500 against Defendants jointly and severally. The jury returned a no cause against GMC and awarded Plaintiff $15,000 against MESC. Plaintiff's attorney fees after the trial were $64,746.25. The Court determined the reasonableness of the Plaintiff's attorney fees, reduced the $64,746.25 by the fees incurred pursuing the claim against GMC, reduced the fees for duplicative work incurred from substituting attorneys, and Plaintiff was awarded $25,281.25 in attorney fees pursuant to the Handicapper's Civil Rights Act, MCLA 37.1606(3). MCLA 37.1606(3) states that damages, pursuant to the act, include "reasonable attorneys' fees."

After the judgment for $40,281.25 was entered, the verdict plus the attorney fees, Plaintiff sought to obtain mediation sanctions against Defendant MESC. The Court held once the Plaintiff has recovered 100% of his or her reasonable attorney fees, MCR 2.403 could

not be utilized to recover additional or double recovery. However, MCR 2.403 could be utilized to obtain 100% of the reasonable attorney fees.

Haliw v City of Sterling Heights, 257 Mich App 689, 669 NW2d 563 (2003) overruled on other issues in *Haliw v. City of Sterling Heights*, 471 Mich. 700, 691 N.W.2d 753 (2005), sets forth the amount of attorney fees recoverable citing the *McAuley* case and also, referencing *Rafferty v. Markovitz,* 461 Mich. 265, 272-273 and n. 6, 602 N.W.2d 367 (1999) stating:

> Moreover, our Supreme Court has explicitly recognized that actual, reasonable **attorney fees may be obtained under MCR 2.403(O) even where a statute also provides for the recovery of attorney fees, provided that the prevailing party receive no more than actual and reasonable fees**. See *Rafferty v. Markovitz*, 461 Mich. 265, 272-273 and n. 6, 602 N.W.2d 367 (1999), and *McAuley v. Gen. Motors Corp.*, 457 Mich. 513, 578 N.W.2d 282, 284 (1998).' The *Rafferty* Court followed *McAuley* but repudiated its dicta that a double recovery of attorney fees may be possible in certain cases. *Rafferty*, *supra* at 272-273 and n. 6, 602 N.W.2d 367. In sum, that one rule may permit the recovery of reasonable attorney fees, i.e., sanctions for frivolous claims or defenses authorized by statute, M.C.L. § 600.2591, and by court rules, MCR 2.114; MCR 2.625(A)(2), or for a vexatious appeal under MCR 7.216(C), does not preclude the application of MCR 2.403(O), provided a litigant has not already recovered all of its reasonable attorney fees under the other rule.

In the instant case, it is clear that 100% of reasonable attorney fees had not been awarded.

Defendants allege that because the jury assessed statutory attorney fees at trial, that the application of case evaluation sanctions is unconstitutional. This is erroneous.

The jury is called upon to determine damages, not sanctions. Damages are compensation for the loss or injury suffered. *See* Blacks Dictionary Revised 4th Ed. 1968. Case evaluations are assessed subsequent to the determination of damages by the jury.

In *Phillips v Mirac, Inc.*, 470 Mich 415, 685 NW2d 174 (2004), the Michigan Supreme Court addressed the meaning of the phrase "right to a jury trial" under Const. 1963 art 1 § 14 stating:

> Considerable insight into this scope of this right, both historically and as it was understood in the first half of the twentieth century, is provided in the encyclopedic article on this issue in the 1918 Harvard Law Review by Harvard Law professor Austin Wakeman Scott, *Trial by jury and the reform of civil procedure,* 31 Harv. L. R. 669 (1918). While, not surprisingly, Professor Scott found certain elements to have long been regarded as of the "essence" of trial by jury, such as unanimity, impartiality, and competence of the jury, *id.* at 672-674, he also found that the only matters "properly within the province of the jury" are questions of fact. *Id.* at 675. All other questions, being questions of law, are for the court. *Id.* at 677. [FN10] Professor Scott's article served as the bedrock for the United States Supreme Court decision, *Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), in which the Court discussed these concepts and concluded that the jury was confined to finding facts and that law was for ***427** the courts and, moreover, that falling within the ambit of law was the assessment of civil penalties. As the Court said, **"The assessment of civil penalties thus cannot be said to involve the 'substance of a common-law right to a trial by jury,' nor a 'fundamental element of a jury trial.'** " *Tull, supra* at 426, 107 S.Ct. 1831. This holding in *Tull* was not unexpected because it followed a similar holding in *Galloway v. United States,* 319 U.S. 372, 392, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943), in which the Court opined that, as expressed in the United States Constitution, the right of trial by jury **extends only to "its most fundamental elements, not the great mass of procedural forms and details...."**
>
> This should not be taken as dismissing the jury's importance. It is for the jury to assimilate the facts presented at trial, draw inferences from those

facts, and determine what happened in the case at issue. See, e.g., *Green v. Detroit U. R.*, 210 Mich. 119, 129, 177 N.W. 263 (1920). As important as those duties are, however, matters of law concern the legal significance of those facts. Accordingly, excluded from the jury's purview are such matters as whether a party has met its burden of proof, whether certain evidence may be considered, which witnesses may testify, whether the facts found by the jury result in a party being held liable, and the legal import of the amount of damages found by the jury. [FN11] Thus, for example, while a jury may find a defendant has acted negligently and the amount of damages occasioned thereby, the court may apply the governmental ***429** immunity act, MCL 691.1407, and find there is no liability, despite the plaintiff's damages. Or a jury may find a hunter has been injured and damaged on a defendant's property because of the defendant's negligence, but the recreational trespass act, MCL 324.73107, will, in certain circumstances, preclude liability. Moreover, uncontroversially, **after the jury has been dismissed, a court may enter an order that doubles or trebles the amount of damages assessed, pursuant to any of the numerous statutes that concern postverdict adjustment of damages**. [FN12] In many ways this parallels the criminal system. ****183** While the jury is to find the facts, **the court defines the crime and determines the sentence along with any fees or fines to be imposed on the basis of the guidance and requirements set forth by the Legislature.** The damage cap is of a piece with these numerous examples that for generations have not been successfully challenged on the basis of constitutional infirmity and that reflect the previously unchallenged understanding springing from a recognition that juries decide only facts.

Statutes doubling or trebling damages include MCL 125.996, 230.7, 257.1336; statutes that set a minimum recoverable amount include MCL 14.309, 339.916, 445.257, 445.911, 550.1406; statutes that provide for adding costs, fees, interest or penalties to awards include MCL 35.462, 125.1449m; court-determined remittitur and additur is provided for in MCR 2.611(E); and postverdict reduction of awards to present value is permitted by MCL 600.6306(1)(c). "[T]he practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers [of the United States Constitution] produced the Eighth Amendment [relating to excessive bail, fines, or cruel or unusual punishment]." *Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

The purpose of case evaluation sanctions "is to place the burden of litigation costs upon the party which requires a trial by rejecting a proposed mediation award." *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co,* 194 Mich.App 230, 235; 486 NW2d 68 (1992). "[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." *Campbell v. Sullins,* 257 Mich.App 179, 198; 667 NW2d 887 (2003).

This is a procedural rule applied subsequent to a jury's assessment of damages and are only awardable in specific circumstances.

Defendants make several arguments that Plaintiffs are essentially attempting to "get one over" on the system because after they requested additur, and then filed a motion for case evaluation sanctions. This is simply irrelevant to these proceedings. There are several mechanisms availed to both sides that may affect the final outcome subsequent to trial, i.e. additur, remittitur, sanctions to frivolous filings, treble damages, etc.

This appeal is not about dissatisfaction in the jury award, its about the applicability, interpretation, and the judicial discretion afforded in MCR 2.403.

Under Defendants' logic, this case would have to be returned for a new trial so that the jury could hear about case evaluation and then make an award which also considers the facts and circumstances related to a suggested settlement. As the case stands, the jury was not aware of the case evaluation award and has not taken into consideration Defendants' rejection and the final outcome, or the equitable relief granted by the trial court.

There is simply no authority to support Defendants contentions that there is a constitutional right to a jury trial to assess sanctions.

The case law clearly requires the Court to determine the reasonable amount of attorney fees and then deduct any attorney fees previously awarded when it awards mediation sanctions to prevent "double dipping." This premise does not negate the requirement under the mediation sanction rule that sanctions are mandatory; it simply prevents a prevailing party from receiving more than 100% of the reasonable amount of attorney fees as determined by the Court.

Plaintiff requests that the lower court is affirmed.

II. DID THE COURT OF APPEALS ERR IN FINDING THAT PLAINTIFFS JAMES AND KIM LINDEBAUM WERE ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS IN THE CASE, WHERE THE ADJUSTED VERDICT WAS LESS THAN THE LUMP-SUM AWARD ELECTED BY THE PLAINTIFFS PURSUANT TO MCR 2.403(H)?

Both parties agree that the methodology adopted by the Court of Appeals is clearly erroneous. The central distinction between the two arguments is whether the trial court had the authority to take into consideration the injunction when setting the amount of case evaluation sanctions and whether it was "fair under all the of the circumstances." Plaintiff's position on this matter is adequately set for in their application.

In the event that the Court does not agree that the injunction could be taken into consideration, Plaintiff disagrees with Defendants argument that it is the **total adjusted verdict** that must be more favorable to the Plaintiffs. Because the case evaluators in this case treated Plaintiffs as a single party, it is the aggregated amounts adjusted received by the Plaintiffs against the particular Defendant compared to the case evaluation assessed

against said Defendant.[17] If the Defendants' argument is adopted that MCR 2.403(5) does not apply, then MCR 2.403 (O)(1) and (O)(4)(a) indicate that the parties must be compared.

In this instance without taking into consideration the injunctive relief, Plaintiffs are clearly entitled to sanctions against Diane Rankin. It was the Defendants that requested that the evaluation be assessed against each particular Defendant separately. As a result, Ronald Schmidt was allowed to accept mediation and is not now liable for case evaluation sanctions.

As set forth in Exhibit L, Defendants requested the breakdown was specifically assessed against Diane Rankin and Joyce Schmidt. Plaintiffs were treated as a single party, but the Defendants were not. MCR 2.403(O)(4)(a) indicates that in this instance, the Court shall compare the evaluation and the verdict between the particular pair of the parties, i.e. Plaintiffs v. Joyce Schmidt, and Plaintiffs v Diane Rankin.

Contrary to the assertion of the Defendants, Plaintiffs were not required to accept or reject the award *in toto*. Rather, pursuant to MCR 2.403(L)(3)(a), Plaintiffs as a single unit had the option of accepting the award against one Defendant and rejecting the award against the other. It is only against the particular opposing party that the evaluation had to be accepted *in toto*. Plaintiffs have clearly done better as a group against Diane Rankin.

If the evaluation was not separated, then the total verdict would be aggregated for comparison, however, this is not the situation at bar. *See J.C. Bldg. Corp. II v. Parkhurst Homes, Inc.*, 217 Mich.App. 421, 552 N.W.2d 466 (1996). Here, both the verdict and the

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17 The case evaluation against Joyce Schmidt is $17,500.00; this should be compared to the jury verdict assessed against Joyce of $9,000.00 plus assessable costs and interests. The case evaluation against Diane Rankin is $7,500.00 compared to the aggregate verdict of $11,000.00 plus assessed costs and interests. MCR 2.403(O)(3), (O)(4)(a), and (O)(1).

evaluation were separated and could be easily compared between the "single" Plaintiff and each Defendant.

The verdict is not more favorable to the Defendants because the case evaluators were unable to award equitable relief. Both the trial court and the Court of Appeals agreed that the injunction was part of the verdict. Further, had the Plaintiff's not proceeded to trial, they would not have received the sought after injunction. Therefore, the final verdict was also more favorable to the Plaintiffs.

III. THE TRIAL COURT DID NOT IMPROPERLY CONSIDER THE POST-TRIAL INJUNCTIVE RELIEF WHEN AWARDING CASE EVALUATION SANCTIONS TO THE PLAINTIFFS.

Plaintiffs at no time hid the fact that they were seeking injunctive relief. The trial court was informed during the September 2001 pretrial hearing and the trial court noted the request for injunctive relief in the pretrial statement. (Exhibit H) Further, a request for injunctive relief was set forth by each Plaintiff in their individual response to answers to interrogatories. (Exhibit I) See also Exhibits D and G, ¶ 37. The equitable injunctive relief was best decided by the court after the completion of all the proofs.

As a result of Defendants egregious behavior and pursuant to MCR 2.403(O)(5), it was appropriate under the circumstances in this case to award case evaluation sanctions. Defendants through their behavior necessitated this lawsuit. Plaintiffs' primary goal was injunctive relief to end the slander, libel, and harassment. (Exhibit D, G, H, I; PX 13; Vol VI, Pg 179-180) Plaintiffs through the November 7, 2000 letter from attorney Skinner demanded that the conduct stop, Defendants ignored this request and the promise of the Plaintiffs that a lawsuit would be filed.

The Defendants rejected the case evaluation award assuming the risk that the Plaintiffs may obtain a better award at trial than the award set forth in the case evaluation award. This did in fact occur. Not only were the Plaintiffs awarded a monetary judgment subsequent to a directed verdict, the Plaintiffs were also awarded a permanent injunction.

Pursuant to MCR 2.403(O)(5), the trial court had the discretion to take into consideration monetary and equitable relief in determining whether to award case evaluation sanctions. Contrary to the assertion by Defense counsel that equitable relief cannot be considered when both parties reject case evaluation, there is absolutely no support for this law supporting this position.

MCR 2.403(O)(5) does not indicate, "this subrule refers to a single 'rejecting' party" as stated by the Defendants. (Defendants Appeal Brief, Pg 12) Furthermore, were this to be the holding of the court, such a ruling would be in contradiction of the policy to award case evaluation sanctions to the prevailing party.

Defendant relies on a single sentence in the lengthy Court of Appeals opinion to support its position that MCR 2.403(O)(5) does not apply: "Defendants are thus technically correct in arguing that MCR 2.403(O)(5) does not, by its terms, contemplate the situation here. (Exhibit A, p. 6) The Defendant does not point out that the Court goes on to explain this statement and rationale when it states in the subsequent sentence that: "MCR 2.403(O)(5) certainly does not prohibit the trial court from placing a value on equitable relief granted and using it in comparing the verdict and the case evaluation in the situation presented in this case. To do so furthers the apparent purpose of the rule." (Exhibit A, p. 6)

A. MCR 2.403(O)(5) Takes Into Consideration Equitable Relief

MCR 3.310(H) permits an injunction in conjunction with the final judgment. The harassment by the Defendants was not single and isolated, but a continuous pattern conducted to hurt the Plaintiffs as admitted by Defendants. The trial court's order for equitable relief is **not on appeal**. Defendants are not asking to have the injunction quashed.

MCR 2.403(O)(2)(c) and (O)(5) take the relief set forth in MCR 3.310(H) into consideration. Pursuant to MCR 3.310(H) the injunctive relief is in "connection" with the judgment, meaning the judgment and injunction are joined together. *See* Blacks Law Dictionary. MCR 2.403(O)(2)(c) defines "verdict" as rulings on motions after case evaluation and jury verdicts. The injunction is part of the jury verdict and it was brought by motion after case evaluation. This injunction also followed a jury trial. *See* MCR 2.403 (O)(2)(a). Furthermore, MCR 2.403(O)(5) specifically grants the trial court authority to take equitable relief into consideration when determining the prevailing party and in awarding sanctions. MCR 2.403(O)(5) is not limited to bench trials.

> MCR 2.403(O)(5) provides:
>
> (5) **If the verdict awards equitable relief**, costs **may** be awarded if the court determines that
>
> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
> (b) it is fair to award costs under all of the circumstances.

This issue is specifically addressed in *Linden Inv. Co. v. Minca*, 1999 WL 33435355 (*Unpublished Michigan Court of Appeals*), where the Plaintiff sought both monetary and equitable relief. In *Minca*, Plaintiff filed a quiet title and slander of title action against several

Defendants. The case was mediated in March 1996, and the evaluators awarded a judgment of foreclosure in favor of plaintiffs against defendants' interests, with no money damages to any party. Plaintiffs accepted and Defendants rejected the award. After a bench trial, the Court quieted title but did not award money damages, the same award as the mediation. Plaintiff sought mediation sanctions against the Defendants. Defendants Frens, husband and wife, argued that the court erred in awarding mediation sanctions against them. The Court stated:

> The purpose of the mediation sanction rule, MCR 2.403(O), is to encourage settlement by placing the burden of litigation costs on the party who insists upon trial by rejecting the proposed mediation award. *Forest City Enterprises, Inc v. Leemon Oil Co*, 228 Mich.App 57, 78-79; 577 NW2d 150 (1998). A case is appropriate for mediation if it is a civil case where the relief sought is primarily money damages or division of property. MCR 2.403(A)(1); *Forest City*, *supra* at 79. A mediation panel can determine an equitable claim when determining the amount of damages, but it is not proper for a mediation panel to make a separate award for equitable relief. MCR 2.403(K)(3); *Forest City*, *supra*. However, where the court's verdict includes equitable relief, costs may be awarded pursuant to MCR 2.403(O) if the court determines that 1) taking into account both the monetary and the equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and 2) it is fair to award costs under all of the circumstances. MCR 2.403(O)(5); *Forest City*, *supra* at 79.
>
> .....
>
> Here, the proper portion of the evaluation was zero. The verdict awarded plaintiffs zero damages with respect to the slander of title claim. Pursuant to MCR 2.403(O)(3): "If the evaluation was zero, a

> verdict finding that the defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." While the portion of the verdict awarding no damages to plaintiffs with respect to their slander of title claim was more favorable to defendants, when the equitable relief awarded by the verdict is considered along with the legal relief, MCR 2.403(O)(5), it cannot be said that the entire verdict was more favorable to defendants than the mediation evaluation. Furthermore, we believe that it was "fair to award costs under all of the circumstances." MCR 2.403(O)(5)(b). We therefore conclude that the trial court did not err in awarding mediation sanctions against the Frens.

Similarly, in *C.A. Muer Corp. v Zimmer*, 1997 WL 33344470 (*Unpublished Michigan Court of Appeals*), a jury awarded monetary damages and the trial court awarded a permanent injunction. In *Zimmer*, Plaintiff requested "whatever other relief in favor of Plaintiff that the Court deems appropriate." The case evaluation award was $3,000.00. The jury awarded $2,500 in damages and the court awarded a permanent injunction. The Court of Appeals reiterated that:

> If defendant had accepted the mediation evaluation, then the judgment would have been "deemed to dispose of all claims in the action and [would have] include[d] all fees, costs, and interest to the date of judgment." MCR 2.403(M)(1). Thus, **defendant's rejection of the mediation recommendation made her susceptible to the liability of incurring costs, including the costs necessary to obtain plaintiff's equitable relief**. MCR 2.403(O)(5).

In the instant case, it was reasonably foreseeable that an injunction would be sought. It is the ultimate verdict that determines whether case evaluation sanctions are appropriate.

The Plaintiffs in this case were forced to proceed to trial to obtain equitable relief. This action is supported further by the mere fact that Defendants filed a lawsuit during these proceedings making further claims that Plaintiff James Lindebaum hid gold, exerted undue influence over his mother's trust, breached fiduciary duties, etc.[18] (Exhibit CC) Similar to *Zimmer*, the jury awarded monetary damages and the court ordered a permanent injunction.

Even if there were no money damages awarded by the jury and only the injunction, pursuant to MCR 2.403(O)(5), the trial court could have determined that Plaintiffs prevailed and were entitled to case evaluation sanctions.

MCR 2.403(O)(5) is an exception to the general rule set forth in MCR 2.403(O)(1) and is applicable to situations where equitable relief is awarded. Specific statutory language prevails over inconsistent general language. *Jones v. Enertel, Inc.,* 467 Mich. 266, 270-271, 650 N.W.2d 334 (2002). MCR 2.403(O)(1) is applicable to monetary judgments only, evident by the clear language of 2.403(O)(5) which specifically carves out a specialized rule for cases where equitable relief is granted. Furthermore, Defendants' reliance on MCR 2.403(O)(3) which sets forth the 10% rule when there are two rejecting parties is unfounded because that section contemplates only a monetary award. Section 5 takes into account the prevailing party and vests the trial court with the discretion to take into account any equitable

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[18] On or about November 5, 2002, the Defendants in this case filed a complaint in Ogemaw County against James Lindebaum as further harassment claiming undue influence of the parents' estate. This suit was filed more than three years after the death of Elizabeth Lindebaum. This case was dismissed in April 2004 with prejudice by stipulation of the parties. Defendants apparently filed this lawsuit in order to testify at trial that they were investigating their unsupported allegations of "embezzlement" of Joseph and Elizabeth Lindebaum's estate. This case was then transferred to Judge Caprathe and dismissed.

relief. The trial court can determine that based on both equitable and monetary relief, the verdict is not more favorable to the rejecting party, and then award costs where it is fair under all the circumstances.

The Defendants argue that MRC 2.403(O)(5) does not apply to two rejecting parties because it does not include the statement that "if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation" as set forth in MCR 2.403(O)(1). Sections (O)(1) and (O)(5) do not serve the same purpose. Section (O)(1) addresses a single rejecting party and multi-rejections for money judgments only. Section (O)(5) however, addresses all situations where equitable relief is granted. It does not distinguish between a single and multi-party rejection.

In the instant case, taking into consideration the monetary relief of $23,315.54 and the three year permanent injunction, the trial court determined that this was not more favorable to the rejecting Defendants, Joyce Schmitt and Diane Rankin.[19] Once determining that the award was not more favorable, pursuant to MCR 2.403(O)(5), "costs may be awarded" if the trial court determines that it is fair to award costs under all the circumstances.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v. Wilkes,* 470 Mich. 661, 665; 685 NW2d 648 (2004). When the language of the rule is clear and unambiguous, the court must enforce the

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[19] Defendants meet the 10% rule against Diane Rankin. MCR 2.403(O)(3). Case evaluation was $7,500.00 and the jury awarded $11,000.00. The injunction is primarily an issue with Joyce. The Defendants specifically requested to be treated separately at case evaluation. (Exhibit K) Defendants attempt to treat Diane and Joyce aggregately on appeal; however, if this Court determines that the trial court should not have considered equitable relief, Plaintiff maintains that the sanctions against Diane should be affirmed. MCR 2.403.

meaning plainly expressed. *Grievance Administrator v. Underwood*, 462 Mich. 188, 193-194, 612 N.W.2d 116 (2000). If construction is necessary, the first principle guiding a review is to apply the plain language of the rule, giving effect to the ordinary meaning of the words used in light of the purpose to be accomplished. *Dessart v. Burak*, 252 Mich.App. 490, 497; 652 N.W.2d 669 (2002); *Dykes v. William Beaumont Hosp.*, 246 Mich.App. 471, 484; 633 N.W.2d 440 (2001).

When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v. O'Rourke,* 444 Mich. 535, 542- 543; 510 NW2d 900 (1994); *People v. Hendrick,* 261 Mich.App 673, 679; 683 NW2d 218 (2004).

MCR 2.403(O)(5) is not the only exception to MCR 2.403(O)(1). MCR 2.403(O)(11) is the interest of justice exception; the exception also provides the trial court with the discretion to award or deny case evaluation sanctions. Defendants attempt to create confusion and ambiguity by blending the exception of (O)(5) with the general rules set forth in (O)(1) and (O)(3). There is only one clear reading consistent with the intent of providing the trial court with the discretion to award case evaluation sanctions where both monetary and equitable relief were awarded, and maintain the policy that the rejecting party bears the burden of costs in litigation. Both the *Minca* and *Zimmer* Court's, *supra*, recognized the same reading as the Honorable Caprathe in the case at bar.

Defendants Joyce Schmitt and Diane Rankin acted in an intentional manner to defame the reputations of Kim and James Lindebaum, and JoAnn and Kerry Kusmierz. Although the aggregate actual monetary award was less than the case evaluation award, taking into consideration the equitable award entered on behalf of all the Plaintiffs, the award

is not more favorable to the Defendants and under the circumstances it would be only fair to treat the Plaintiffs as the prevailing party and award them costs incurred in this lawsuit.

B. MCR 3.310(H) Permits the Trial Court to Grant an Injunction Before or in Conjunction with the Final Judgment and Should Be Considered Part of the "Verdict."

MCR 2.403(O)(2) indicates:

> (2) For the purpose of this rule "verdict" includes,
>
> **(a) a jury verdict,**
> (b) a judgment by the court after a nonjury trial,
> **(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.**

"Judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." *Cheron, Inc. v Don Jones, Inc.*, 244 Mich App 212, 625 NW2d 93 (2000) citing Black's Law Dictionary (7th ed.), p. 846. There is no requirement that a document be entitled "judgment." *Id.* at 221. As stated by the Court of Appeals in *Cheron*, "such a requirement would elevate form over substance." *Id.*

Defendant's continued reliance on MCR 2.403(O)(1) to argue that injunctive relief should not have been considered a part of the "verdict" for purposes of assessing sanctions continues to ignore MCR 2.403(O)(5) which takes into consideration an equitable award. According to Defendant's arguments, "verdict" as defined by MCR 2.403(O)(2) would never take into consideration equitable relief. MCR 2.403(O)(5) must be reconciled with the reading of the entire court rule.

As stated most recently in the unpublished case *Moontrap Ltd. Partnership v. SGE Entertainment*, 1998 WL 1988404 (*Unpublished Michigan Court of Appeals*), "Under Michigan law, the parties did not have a right to a jury trial on the claim for equitable relief. *Gelman Sciences, Inc v. Fireman's Fund Ins Co,* 183 Mich.App 445, 450; 455 NW2d 328 (1990). Therefore, although the jury properly decided factual questions relating to legal issues, the trial court retained the authority to determine the facts as they related to the equitable remedy. *ECCO, Ltd v. Balimoy Mfg Co,* 179 Mich.App 748, 751; 446 NW2d 546 (1989)." MCR 2.509(C)(1) indicates that the party is deemed to have "demanded trial by jury for all the issues **so triable**." Claims for equitable relief are not so triable.

Equitable relief can be ordered by the trial judge in conjunction with a jury verdict. In an action in which some issues are to be tried by jury and others by the court, the court may determine the sequence of trial of the issues. MCR 2.509(C). The trial court may determine on its own initiative that there is no right to a jury trial on some of the issues. MCR 2.509(A)(2). The court's decision that injunctive relief was appropriate is in further conformance with MCR 2.514(C) which permits the trial court to make findings excluded from the special verdict form, i.e. questions concerning injunctive relief. There is no requirement that a party must make a request for a separate trial where there are both monetary and equitable relief requested. MCR 2.505(B) merely indicates that a court may bifurcate issues.

The order granting injunctive relief was granted in conjunction with the monetary judgment and **signed the day before the monetary judgment**. (Exhibits E and K) There is no requirement that the verdict be contained in a single document. In fact, originally, Defendants sought to have separate judgments entered for each Defendant. (Exhibit L) MCR

2.602 implies that more than one judgment may be entered, the only requirement being that the court must indicate whether the order resolves all pending matters. MCR 2.602(A)(3).

None of the cases cited by the Defendants in support of their argument that the injunctive order should not be considered part of the verdict are on point with the case at bar. None of the cases directly address MCR 2.403(O)(5). The order for injunctive relief directly relates to Defendants' conduct as testified at trial, not a new post-trial issue.

In *Marketos v American Employers Ins Co.*, 465 Mich 407, 633 NW2d 371 (2001) the jury set the actual cash value on the verdict form and the trial court adjusted the jury's findings based on trial evidence, legal principles, and insurance policy language. The Michigan Supreme Court stated "in this case, the actual "verdict" was the decision by the court using the jury's factual findings."

Marketos supports Plaintiffs position and is relied upon by the Court of Appeals that the trial court must look at the monetary judgment and equitable relief in assessing case evaluation sanctions in the instant case.

C. The Case Evaluation Panel Is Not Granted The Authority to Award Equitable Relief.

The Complaint, paragraph 37, indicates that damages include those which may arise during the course of discovery. All four plaintiffs requested injunctive relief in their answers to interrogatories. The pretrial statement indicates equitable relief is sought. (Exhibits D, H, I, G)

MCR 2.403(K) states:

> (3) The evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of an award.

Plaintiff's claims were never altered. Defendants are confusing "claims" with "relief requested." The Plaintiff's' amended complaint did not alter the claims, but merely clarified the relief sought by the trial court.

In *Accetture v Nordman*, 2000 WL 33401848 (*Unpublished Michigan Court of Appeals*), the mediators ordered that each Plaintiff pay $30,000.00 and did not address any requests for equitable relief. All parties rejected the mediation. The Court indicated that it must assume that all the issues were presented to the panel. The mediation panel is not required to indicate whether there was a consideration for equitable relief. *Id.* citing MCR 2.403(K)(3).

This issue was previously addressed in *Linden Inv., Co., v. Minca*, 1999 WL 33435355 (*Unpublished Michigan Court of Appeals*), a case factually similar to the case at bar and discussed *supra.* The Court of Appeals indicated that "A mediation panel can determine an equitable claim when determining the amount of damages, but it is not proper for a mediation panel to make a separate award for equitable relief. MCR 2.403(K)(3)"

See also Dane Const., Inc. v Royal's Wine & Deli, Inc., 192 Mich App 287 (1991), stating that Plaintiff is able to seek alternate remedies. In *Dane*, the trial court held that the mediation was accepted by the parties. The mediation awarded only monetary damages and a judgment was entered accordingly. However, the trial court further held that the entry of judgment based on the mediation award did not preclude Plaintiff from requesting equitable

relief, in that case, enforcement of a construction lien. The Appellate Court held "Although the mediation panel could have considered plaintiff's equitable claim in determining the amount of damages, it could not make a separate award for equitable relief. MCR 2.403(K)(3); *R.N. West Construction Co. v. Barra Corp. of America, Inc.,* 148 Mich.App. 115, 117-118, 384 N.W.2d 96 (1986). Therefore, the mediation evaluation and the resulting judgment could not have provided relief on plaintiff's claim for foreclosure under the construction lien." *Id* at 293.

In the instant case, neither the jury nor the mediation panel could award injunctive relief. Plaintiffs were required to seek such relief from the trial court.

New claims were never added to the compliant, the only amendment was to clarify the money damages.

Defendants reliance on *McCarthy v Auto Club Ins. Ass'n.*, 208 Mich App 97, 527 NW2d 524 is completely unfounded. In *McCarthy*, there was no issue before the court or mediation panel with regard to equitable relief. The issue was future medical damages and it was unknown whether that amount would actually have to be paid by the Defendant. The amount was not yet incurred and was a conditional payment. Furthermore, *Miller v Village Hill Development Corporation*, 2001 WL 754050 (*Unpublished Michigan Court of Appeals*) fails to address the issue at bar. In *Miller*, new counts/theories were added to the complaint. The only changes made to the complaint in the case as bar were clarifications regarding damages. MCLA 600.2911 which permits attorney fees in a defamation case and is not a distinct theory from Plaintiffs count on defamation.

The cases cited and referred to by the Defendants reference amendments to theories, not clarification with respect to damages. Furthermore, none of the cases cited by the Defendants refer to cases where damages sought include equitable relief.

D. Trial Court's Reliance on the Injunctive Order Was Fair Under All The Circumstances

The trial court's decision was far from shocking and unfair. Defendants showed up at trial and for the first time admitted that their conduct was wrong and inappropriate after four years of litigation and the filing of the Ogemaw lawsuit. Defendants' conduct forced this case to trial. Defendants rejected case evaluation, denied their liability, and caused Plaintiffs substantial expense subsequent to case evaluation.

Defendants falsely accused the Plaintiffs of criminal acts and unchaste behavior. Plaintiffs' attorney sent a letter requesting the termination of Defendants' actions. Letters, phone calls, threats, demands, unsolicited cards and magazines, involvement of business contacts, the Plaintiffs' pastor and friends required nothing less than the injunctive relief ordered by the Honorable Caprathe.

The malicious acts and intentions of the Defendants to ruin the Plaintiffs were evident at trial. Defendants admitted in their own trial brief that their acts constituted defamation per se.

The Court of Appeals' two reasons for finding that the decision was not fair under all of the circumstances are contrary to the law. As stated above, the Court of Appeals indicated that it was not fair for two reasons: (1) the evaluators had not considered equitable relief, and (2) the jury made a determination of attorney fees.

As set forth above, the evaluators do not have the authority to grant equitable relief, and the court would never know whether equitable relief was taken into consideration. With all due respect to the Court of Appeals, this would negate the purpose of MCR 2.403(O)(5) and the grant of discretion to the trial court.

Regarding the jury's consideration of attorney fees, the jury renders a decision regarding damages only. Case evaluations are decided by the Court as a procedural matter and are for the purpose of promoting settlement, not making a Plaintiff hole by compensating them for their damages. Unless the jury was able to hear the facts surrounding the case evaluation, the issue would not be part of their judgment.

Defendants were well aware of the damages sought by the Plaintiffs. They were clearly disclosed on several occasions. Defendants could have requested that the evaluators take the injunctive relief into consideration. Defendants could have even offered to settle at the very beginning of this case by offering injunctive relief. This never happened. There were never additional claims added subsequent to case evaluation.

IV. DEFENDANT JOYCE SCHMITT IS NOT ENTITLED TO AN AWARD OF CASE EVALUATION SANCTIONS

It must be kept in mind that a satisfaction of judgment has been entered in this matter. Plaintiffs assert that all other issues are mooted, including any issue of sanctions to be awarded to the parties who paid in settlement of the judgment against them. Joyce Schmidt Satisfied her judgment voluntarily by submitted a check. (Ex. P)

However, if this Court does determine that Defendant Joyce Schmitt is entitled to sanctions, Plaintiffs request a hearing on remand to determine the amount. Attorney Schrope

claims a higher hourly rate than attorney Skinner, and it must be determined whether said rate is reasonable. Additionally, Defendant requested $51,960.00 in sanctions in contradiction of attorney Schrope's affidavit. (Exhibit W) Attorney Schrope indicated that he spent a total of 189 hours on this case. Attorney Schrope's affidavit states that 94.4 hours should be allocated to **Defendant Joyce and Tobe Schmitt**. This would also need to be allocated to determine what specific fees Joyce incurred. Even assuming that attorney Schrope's hourly rate is reasonable the amount is approximately $12,500.98 plus costs claimed to be less than $1,000.00, not $51,960.00 as set forth in the original appeal brief.

Schrope:	94.4/2 ($230.00) = $10,856.00
Holmes:	12.75/2 ($230.00) = $1,466.25
Total	= $12,500.98

The most that the Defendants would be liable for is $12,500.98 pursuant to the case evaluation rule. If Joyce and Tobe each accumulated half, the $12,500.98 would be divided by 2.

The rate set forth by Defendant Schrope is not the rate actually charged. Plaintiffs intend to subpoena attorneys Schrope and Holmes for testimony at the time of the hearing to determine the reasonableness of said fee.

Furthermore, pursuant to the MCR 2.403(O)(5), the trial court has the discretion to deny case evaluation sanctions where equitable relief is granted.

Conclusion

The trial court acted within the discretion granted pursuant to MCR 2.405(O)(5) and awarded case evaluation sanctions. The Court of Appeals erroneously assumed that evaluators had to take equity into consideration to apply MCR 2.403(O)(5) also erroneously concluded that where a jury awards attorney fees, case evaluation sanctions are unfair. There is no precedent or basis for such a ruling. If this is the case, what other types of damage awards exclude the application of MCR 2.403?

If this Court determines that MCR 2.405(O)(5) does not apply, the award as to Diane should be affirmed. Plaintiffs were the prevailing party monetarily against Diane and the Defendants were treated separately at case evaluation.

Plaintiffs request that all red herring issues which occurred during trial, and are not appealed, be ignored. The issue in this case is whether case evaluation sanctions were appropriate pursuant to the court rule and whether the trial court's decision to take into account equitable relief was warranted and within its discretion.

Relief Request

Plaintiffs request that the order of the trial court is affirmed, or in the alternative, that all objections to the case evaluation order were waived after the order was satisfied.

Respectfully submitted,

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